85-2131

Supreme Court, U.S.
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No. 85-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LEVY AUTO PARTS OF CANADA,
MORRIS P. LEVY AND AL RASKIN,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

At issue is an unprecedented construction of the primary federal statute allocating venue over offenses committed outside the United States, 18 U.S.C. § 3238, and of the venue guarantees set forth in Art. III, § 2, cl. 3 and the Sixth Amendment of the Constitution. The specific questions presented are:

1. May the government prosecute an alleged arms export conspiracy in a district determined under 18 U.S.C. § 3238 ("Offenses not committed in any district"), where no part of the offense occurred in such district and the indictment alleges the commission of overt acts in a different State and district within the United States?

2. Where an indictment alleges the commission of overt acts in a State and district within the United States, does the prosecution of a conspiracy in a district where no part of the offense is alleged to have occurred violate the requirement in Art. III, § 2 of the Constitution and the Sixth Amendment that venue be laid in the State and district in which the crime was committed?

PARTIES TO THE PROCEEDING

The caption of the case in this Court contains the names of all parties to the proceeding in the court whose judgment is sought to be reviewed. Although the indictment charges "Levy Auto Parts of Canada," identified as a Canadian corporation, as a defendant, the government was advised that there is no such entity and was asked to identify the entity which was intended to be charged. No such identification has been provided by the government. Petitioners assume that the government would identify the following entities as parent companies, subsidiaries and affiliates of "Levy Auto Parts of Canada":

Seaway Multi-Corp. Limited
Levy Industries Limited
Levy-Russell Limited
Levy Auto Parts, Inc.
Levy Auto Parts Company
American Gear Company, Inc.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
A. Preliminary Statement	2
B. Facts Material To The Questions Presented	3
C. Basis For Federal Jurisdiction In The Court Of First Instance	5
REASONS FOR GRANTING THE WRIT	5
I. WHETHER 18 U.S.C. § 3238 PROVIDES A BASIS FOR VENUE OVER OFFENSES COMMITTED PARTLY WITHIN AND PARTLY OUTSIDE THE UNITED STATES IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT	5
II. THE DECISION OF THE COURT OF APPEALS UPHOLDING VENUE IN A DISTRICT WHERE NO PART OF THE OFFENSE OCCURRED VIOLATES ART. III, § 2 AND THE SIXTH AMENDMENT OF THE CONSTITUTION AND CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT	9
CONCLUSION	12

TABLE OF AUTHORITIES

	PAGE
Ashwander v. *Tennessee Valley Authority*, 297 U.S. 288 (1936) (Brandeis, J., concurring)	6-7
Brown v. *Elliott*, 225 U.S. 392 (1912)	10
Ex Parte Bollman, 8 U.S. (4 Cranch) 75 (1807)	10
Hyde v. *United States*, 225 U.S. 347 (1912)	10
Johnston v. *United States*, 351 U.S. 215 (1956)	9,10
Reid v. *Covert*, 354 U.S. 1 (1957)	5
Salinger v. *Loisel*, 265 U.S. 224 (1924)	10
Travis v. *United States*, 364 U.S. 631 (1961)	9
United States v. *Gilboe*, 684 F.2d 235 (2d Cir. 1982), *cert. denied*, 459 U.S. 1201 (1983)	7
United States v. *Jackalow*, 66 U.S. 484 (1862)	6,9-10
United States v. *Layton*, 519 F. Supp. 942 (N.D. Cal.), *appeal dismissed*, 665 F.2d 274 (9th Cir. 1981)	8
United States v. *Rodgers*, 150 U.S. 249 (1893)	10
United States v. *Williams*, 589 F.2d 210 (5th Cir. 1979), *adopted in relevant part*, 617 F.2d 1063 (5th Cir. 1980) (*en banc*)	8
Art. III, sec. 2, cl. 3 of the Constitution of the United States	*passim*
Amendment VI of the Constitution of the United States	*passim*
18 U.S.C. § 3238	*passim*
Fed. R. Civ. P. 18	2
Revision of Titles 18 and 28 of the United States Code: Hearings on H.R. 1600 and H.R. 2055 Before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, 80th Cong., 1st Sess. (1947)	7

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v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners, Levy Auto Parts of Canada, Morris P. Levy and Al Raskin, respectfully pray for a writ of certiorari to review the opinion and judgment entered in this proceeding by the United States Court of Appeals for the Fourth Circuit on April 10, 1986, reversing the district court's dismissal of the indictment.

OPINIONS BELOW

The decision of the United States Court of Appeals is published at 787 F.2d 946. It is included in the Appendix at pp. A-1—A-12. The orders of the district court dismissing the indictment are unreported, but included in the Appendix at pp. A-13—A-14.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on April 10, 1986. A timely petition for rehearing was denied on May 19, 1986. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article III, section 2, clause 3 of the Constitution of the United States provides:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Amendment VI of the Constitution of the United States provides, in part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State or district wherein the crime shall have been committed . . . .

18 U.S.C. § 3238 provides, in part:

> The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district in which the offender, or any one of two or more joint offenders, is arrested or is first brought . . . .

Fed. R. Crim. P. 18 provides, in part:

> Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed.

STATEMENT OF THE CASE

A. Preliminary Statement

This case presents important questions concerning the proper construction of 18 U.S.C. § 3238, the primary statute enacted by Congress in furtherance of its constitutional authority to select venue for crimes not committed within any State, and of the venue guarantees of the Constitution, Art. III, § 2, cl. 3 and the

Sixth Amendment. In a period of escalating federal investigations and prosecutions of crimes having an international dimension—drug smuggling, arms smuggling, spy rings, immigration violations and terrorism—the questions presented raise important issues of national significance. In an unprecedented construction of the statute and the applicable constitutional provisions, the court of appeals has obscured previously well-defined and clearly-applied legal principles and engrafted exceptions and qualifications on a clear federal statute where Congress intended there to be none. In so doing, the court of appeals has trampled established constitutional guarantees and prior decisions of this Court.

B. Facts Material To The Questions Presented

The indictment in this case accuses several Canadian citizens—"Levy Auto Parts of Canada," Morris P. Levy and Al Raskin—of conspiring with an unindicted Pakistani citizen—Saeed Zakaria—to export tank parts to Iran without a valid export license, in violation of 18 U.S.C. § 371.[1]

The indictment alleges 26 overt acts in furtherance of the conspiracy, occurring between April 7, 1981 and February 3, 1982. Although the indictment recites that the overt acts were committed "outside the jurisdiction of any particular state or district of the United States," the government concedes that two of the alleged acts—Overt Acts 25 and 26—occurred and would support venue in the Western District of Michigan. The indictment was returned in the Eastern District of Virginia, where Zakaria was arrested while passing through customs at Dulles International Airport, on March 25, 1982, allegedly after the commission of the offense. No part of the offense is alleged to have been committed in the Eastern District of Virginia. The government alleged that venue is proper in Virginia under 18 U.S.C. § 3238, solely on the basis of Zakaria's arrest in the Eastern District.[2]

1. There is no allegation that any tank parts actually were exported unlawfully or otherwise.

2. Zakaria entered a plea of guilty to an information charging him and Kabanza, Inc., of which he was chairman of the board, with counseling, aiding and abetting the use of a false end user certificate in

On October 29, 1984, the defendant "Levy Auto Parts of Canada" filed a motion to dismiss the indictment on the ground, *inter alia*, that venue in the Eastern District of Virginia was improper under 18 U.S.C. § 3238, since the indictment alleged overt acts, and hence the commission of the alleged offense, in the Western District of Michigan. On December 7, 1984, District Judge Bryan dismissed the indictment. The district court ruled that the government could not base venue under 18 U.S.C. § 3238, in the Eastern District of Virginia, since that statute authorizes the trial of an offense in a district where a joint offender is first arrested only if there is no other district where venue would be proper. In this case, the alleged offense could be tried, as the government conceded, in the Western District of Michigan. A similar motion filed on behalf of the individual defendants was granted for the same reasons on December 28, 1984.[3]

The United States Court of Appeals for the Fourth Circuit, in a decision which recognized the "difficult question" presented, reversed. 787 F.2d 946, 947. Although the court stated that the relationship between the Michigan acts and the alleged conspiracy was "unapparent on the indictment," it concluded that venue nevertheless could be laid in the Eastern District of Virginia, where no part of the offense occurred, because it viewed the conspiracy as an "*essentially* foreign" one which did not produce "*substantial* activity in furtherance of its purpose in the United States"; moreover, the Michigan activity was "belated" and "ancillary to the primary purpose of the conspiracy." 787 F.2d at 949, 952 (emphasis supplied). The court also concluded that venue in Virginia would not violate the constitutional guarantee to trial in the State and district where the offense was committed

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violation of 22 U.S.C. § 2778 and 22 C.F.R. § § 127.01(c) and 127.02. All proceedings against Zakaria were concluded prior to the return of the indictment in this case.

3. The defendants also moved to dismiss the indictment on the grounds that it did not state an offense within the jurisdiction of the United States, that defendants' Sixth Amendment right to a speedy trial was violated by the government's failure to make any effort to bring the indictment to trial, and that the indictment failed to state an offense under the Arms Export Control Act, 22 U.S.C. § 2778. The district court did not reach these issues.

since conspiratorial activity in Michigan was "slight," trial in Virginia "would be [no] more burdensome" than trial in Michigan, and there was a "substantial investment of time and energy on the part of prosecutors and grand jurors" in Virginia. 787 F.2d at 952.

A timely petition for rehearing was denied on May 19, 1986.

C. Basis For Federal Jurisdiction In The Court Of First Instance

Defendants believe that the courts of the United States do not have jurisdiction over the activity alleged in the indictment since, *inter alia,* none of the alleged conspirators are American citizens and, as the court of appeals recognized, the alleged conspiracy did not produce substantial effects within the United States. Although defendants moved to dismiss the indictment for lack of jurisdiction, neither the district court nor the court of appeals ruled on the issue.

REASONS FOR GRANTING THE WRIT

I.

WHETHER 18 U.S.C. § 3238 PROVIDES A BASIS FOR VENUE OVER OFFENSES COMMITTED PARTLY WITHIN AND PARTLY OUTSIDE THE UNITED STATES IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT

Section 3238 is the primary federal statute allocating venue in the federal courts over crimes committed outside the United States.[4] Correctly construed, § 3238 precludes the laying of venue in a district solely on the basis that an offender was there arrested, if venue may be laid under traditional principles in

4. This statute implements authority given Congress in Art. III, § 2 of the Constitution to select a place of trial for crimes "not committed within any State." *See Reid* v. *Covert,* 354 U.S. 1, 8 and n.9 (1957). Otherwise, "[t]he Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed." Art. III, § 2, cl. 3.

another district in which the offense is alleged to have been committed. *See, e.g., United States* v. *Jackalow*, 66 U.S. 484 (1862). The court of appeals, however, has rejected the only construction of the statute warranted by the statute's plain language and legislative history and, in flagrant violation of the principle articulated in *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring), applied the statute in a manner which exceeds congressional authority under Art. III, § 2, thereby raising serious doubts about the statute's constitutionality. Review by this Court is essential to settle the proper construction of this fundamental statute.

First. The proper venue for the prosecution of offenses allegedly committed partly within and partly outside the United States is an issue of great significance as law enforcement agencies have, in recent years, focused increased resources upon crimes that have an international dimension. These crimes typically involve drug smuggling, arms smuggling, immigration violations, spy rings, terrorist activity and the like, and have dramatically increased in numbers and public notoriety.[5] Clarification of the important venue issues presented in this case is necessary so that the government will not waste its resources initiating proceedings and prosecuting alleged crimes in districts where venue is improper.

Second. The construction of the statute adopted by the court of appeals violated both Congress' intent in enacting the statute, as revealed in its language and legislative history, and Art. III, § 2 of the Constitution and the Sixth Amendment. The government concedes that it could not have brought this prosecution under § 3238 prior to 1948, when the statute provided that the "trial of all offenses committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the

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5. *See, e.g.*, New York Times, May 15, 1986, at A-22 ("Four People Indicted in Arms Smuggling Case"); Washington Post, April 23, 1986, at A-1 ("U.S. Indicts 17 in Plot to Sell $2 Billion in Weapons to Iran"); New York Times, April 17, 1986, at B-28 ("7 Indicted in Arms Smuggling").

district in which the offender . . . is arrested . . . ." The government claims, however, that the scope of the statute changed in 1948 when Congress added the words "begun or" before the word "committed." The government's reliance on this change is misplaced. The legislative history is replete with indications that a change of the magnitude suggested by the government was never intended.[6] Moreover, the title of the statutory section read both before and after the 1948 change "Offenses not committed in any district," which even the court of appeals conceded evinces "congressional intention not to alter radically the earlier reach of that section." 787 F.2d at 950. Where the court of appeals observed that the purpose of the amendment "is not clearly apparent," *id.*, it ran roughshod over the principles of *Ashwander* v. *TVA* by approving the construction of the statute most likely to call the statute's constitutionality into question.

Third. The Court of Appeals for the Fourth Circuit and the Court of Appeals for the Second Circuit have construed the statute in sharply divergent ways. In *United States* v. *Gilboe*, 684 F.2d 235 (2d Cir. 1982), *cert. denied*, 459 U.S. 1201 (1983), the Second Circuit flatly rejected the interpretation of § 3238 offered by the government in this case:

> Appellant claims that under 18 U.S.C. § 3238 . . . venue would be proper only in the district in which defendant was arrested, the District of Connecticut. But defendant relies on the wrong section; § 3238 applies only to offenses 'not committed in any district,' as its title indicates. But that is not the situation here. The appropriate section to apply in this case is 18 U.S.C. § 3237(a) . . . .

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6. *See, e.g., Revision of Titles 18 and 28 of the United States Code: Hearings on H.R. 1600 and H.R. 2055 Before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives*, 80th Cong., 1st Sess. at 4 (1947) (Remarks of Representative Robsion) (The revision and codification of Title 18 "does not change the law or the meaning of the law"); *Id.* at 40 (Remarks of Charles J. Zinn) ("It is clearly indicated in each of those revisers' notes whether any change was intended . . . but a mere change in language will not be interpreted as an intent to change the law"). The Reviser's Notes to § 3238 state only that the "[w]ords 'begun or' were inserted to clarify scope of this section and section 3237 of this title."

684 F.2d at 239. *See also, United States* v. *Layton*, 519 F. Supp. 942 (N.D. Cal.), *appeal dismissed*, 665 F.2d 274 (9th Cir. 1981) (§ 3238 provides "an arbitrary rule of venue for offenses committed outside the United States"); *United States* v. *Williams*, 589 F.2d 210 (5th Cir. 1979), *adopted in relevant part*, 617 F.2d 1063, 1071 (5th Cir. 1980) (*en banc*) (venue to prosecute a conspiracy in violation of 21 U.S.C. § 963, which does not require proof of an overt act, may be laid under 18 U.S.C. § 3238). Because the lower federal courts have adopted differing constructions of § 3238 guidance from this Court is required.

Fourth. The court of appeals' decision has, by judicial fiat, approved exceptions and qua.ifications to § 3238 where Congress plainly intended none. Thus, permitting venue decisions to turn on whether activity in one judicial district is "surplusage" or "ancillary to the conspiracy" or whether "substantial" or "insubstantial" portions of the offense occurred in the United States are not inquiries that Congress contemplated would be undertaken by the courts in making venue decisions. This type of *ad hoc* analysis indulged in by the court below introduces significant uncertainty, confusion and subjectivity into what was a clearly-defined area of law, and opens the door for lower courts to rewrite indictments in order to uphold venue in a district other than the one in which the alleged offense was committed.

* * *

In sum, this case raises important questions on the proper construction of a fundamental federal statute peculiarly applicable to the increasing phenomenon of crimes of international dimension. It is essential that this Court alleviate the substantial uncertainties caused by the decision below and remind the courts that it is Congress that creates exceptions to its statutory mandates.

II.

THE DECISION OF THE COURT OF APPEALS UPHOLDING VENUE IN A DISTRICT WHERE NO PART OF THE OFFENSE OCCURRED VIOLATES ART. III, § 2 AND THE SIXTH AMENDMENT OF THE CONSTITUTION AND CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT

The result reached by the court of appeals in this case violates the guarantees set forth in Art. III, § 2 and the Sixth Amendment of the Constitution and fails to respect the prior constitutional decisions of this Court. This Court's decisions make clear that, under those provisions, a district court has no jurisdiction to try a crime not committed within the district in which the court sits if the crime was committed within the jurisdiction of any other State or district.[7]

The definitive interpretation of Congress' lack of power under Art. III, § 2 to provide for venue in a district other than one in which the offense is committed, is set forth in *United States* v. *Jackalow*, 66 U.S. 484 (1862). In *Jackalow* the Court explained:

> A material question in this case, in view of this provision [Art. III, § 2] of the Constitution, was, whether or not the offense was committed out of the jurisdiction of any particular State, because, if not, inasmuch as it was not committed within the State of New Jersey, the Circuit Court of the district of that State had no jurisdiction. That jurisdiction depends upon two facts: first, that the offense was committed out of the jurisdiction of any other of the

7. Nor does the Constitution permit the exceptions carved out by the court of appeals. Thus, the court of appeals improperly relied upon its perception that there has been a "substantial investment of time and energy on the part of prosecutors and grand jurors," since the Constitution "fixes the situs of the trial in the vicinage of the crime" and a "variation from that rule for convenience of the prosecution . . . is not justified." *Johnston* v. *United States*, 351 U.S. 215, 220-21 (1956). Indeed, venue provisions in acts of Congress should not be so freely construed as to give the government the choice of a tribunal favorable to it. *Travis* v. *United States*, 364 U.S. 631 (1961).

> States in the Union; and, second, that the prisoner was first apprehended in the district of New Jersey.
>
> Crimes committed against the laws of the United States out of the limits of a State are not local, but may be tried at such place as Congress shall designate by law, but are local if committed within the State. They must then be tried in the district in which the offense was committed. *U.S.* v. *Dawson,* 15 How., 488; 6th Amendment of the Constitution of the United States.

66 U.S. at 486. *See also, e.g., Salinger* v. *Loisel,* 265 U.S. 224 (1924) (an accused cannot be tried in one district under an indictment showing that the offense was committed in another); *United States* v. *Rodgers,* 150 U.S. 249 (1893).

Consistent with *Jackalow,* this Court has held also that, in a prosecution for conspiracy, the accused may be tried in any state and district where an overt act was committed. *Brown* v. *Elliott,* 225 U.S. 392 (1912); *Hyde* v. *United States,* 225 U.S. 347 (1912). Thus, since a conspiracy in violation of 18 U.S.C. § 371 requires proof of an overt act, venue in any district where an overt act occurred comports with the principle that the place of trial is determined "by the acts of the accused that violate a statute." *Johnston* v. *United States,* 351 U.S. 215, 220 (1956).

The government concedes in this case that the indictment alleges the commission of overt acts which would support venue in the Western District of Michigan. In light of those allegations, District Judge Bryan correctly ruled that 18 U.S.C. § 3238 "is designed to protect the government where there's no jurisdiction or no district where the case can be tried" and is unavailable to the government in this case "since there is another venue in which this case can be tried, namely, the Western District of Michigan."[8]

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8. In *Ex parte Bollman,* 8 U.S. (4 Cranch) 75, 135 (1807), Chief Justice Marshall explained that the predecessor of § 3238, effectuating Congress' power under Art. III, § 2 to direct the place of trial of crimes "not committed within any State," was meant to apply in those cases where "there is no court which has particular cognizance of the crime, and therefore, the place in which the criminal shall be apprehended . . . is substituted for the place in which the offense was committed."

In short, the decision of the court of appeals conflicts with settled principles of constitutional law and the decisions of this Court. Review by certiorari is necessary to reaffirm the vitality of both the venue guarantees set forth in the Constitution and the decisions of this Court.

CONCLUSION

For the foregoing reasons, the requested Writ of Certiorari should issue.

Respectfully submitted,

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Dated: June 26, 1986

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-5006

UNITED STATES OF AMERICA,

Appellant,

versus

LEVY AUTO PARTS OF CANADA,

Appellee.

No. 85-5026

UNITED STATES OF AMERICA,

Appellant,

versus

MORRIS P. LEVY,
AL RASKIN,

Appellees.

Appeal from the United States District Court for the
Eastern District of Virginia, at Alexandria.
Albert V. Bryan, Jr., District Judge.
CR-82-00286-A

Argued October 10, 1985 Decided April 10, 1986

Before WINTER, Chief Judge, RUSSELL, Circuit Judge,
and HAYNSWORTH, Senior Circuit Judge

HAYNSWORTH, Senior Circuit Judge:

We are confronted with the difficult question of whether venue for the prosecution of a foreign conspiracy may properly be laid, under 18 U.S.C.A. § 3238, in the district in which a co-conspirator was first arrested, when the indictment alleges minimal contacts with another district arguably sufficient to have warrented prosecution there under 18 U.S.C.A. § 3237(a). The district court held the contacts with the Western District of Michigan

preempted venue in the Eastern District of Virginia, where the co-conspirator was first arrested, and dismissed the indictment. Because the contacts with the Western District of Michigan were belated and only ancillary to the primary purpose of the conspiracy, we conclude that venue was properly laid in the Eastern District of Virginia under § 3238.

I.

Levy Auto Parts of Canada and Morris P. Levy and Al Raskin, Canadian nationals and executive officials of Levy Auto Parts, were indicted in the Eastern District of Virginia and charged with having conspired among themselves and with one Saeed Zakaria, a citizen of Pakistan, to violate the Arms Export Control Act and its implementing regulations. 22 U.S.C.A. §§ 2751-2794. The alleged object of the conspiracy was to procure the exportation of M60 tank engines to Iran under export licenses obtained on the basis of false certificates showing the ultimate destination of the tank engines to be Pakistan.

The indictment alleged 26 overt acts performed in furtherance of the conspiracy. Twenty-four of these acts were alleged to have occurred in April, May and June of 1981. Most of these alleged acts were communications between Levy or Raskin in Toronto or Athens, Greece and Zakaria or others in Pakistan or Iran. During this period, the only hints of domestic activity are allegations that Raskin sent a telex to Zakaria advising that certain requested manuals and other documents containing technical information were being sent to him by an American Airlines flight from Toronto to New York and thence by Pakistan International Airlines to Pakistan, and that, four days later, Zakaria was informed by PIA of the arrival of the parcel in Pakistan from Toronto.

This flurry of communications, as alleged in the indictment, ended in June 1981 with a telex from Zakaria to a deputy minister of defense for the Islamic Republic of Iran advising him of transportation costs from Athens, Greece to Bandar Abbas, Iran. Then, somewhat inexplicably, the indictment charges that eight

months later, on February 3, 1982, Benjamin Levy, the unindicted president of Levy Auto Parts, telephoned by Mr. Rouse of Teledyne Continental Motors requesting price quotations on parts necessary to convert a 1790-2A engine to a 1790-2D engine. That was overt act number 25 in the indictment. Overt act number 26 alleges that Mr. Rouse sent price quotations to Benjamin Levy on February 3, 1982, the day of the telephonic request.

While it does not appear on the face of the indictment, it is agreed that the headquarters of Teledyne Continental Motors is in Muskegon in the Western District of Michigan.

Elsewhere in the indictment, it appears that Iran's M60 tanks were equipped with 1790-2A engines. Production of those engines had been discontinued, and the replacement engines discussed in the communications charged as the first 24 overt acts were 1790-2D engines. There is no reference to conversion kits in the indictment until it is charged that price information was requested and sent in overt acts numbers 25 and 26.

It is thus unapparent on the indictment what, if any, relationship there was between Benjamin Levy's request for price information on conversion kits and the earlier allegations of overt acts in furtherance of the conspiracy involving the exportation of complete model 1790-2D engines. Benjamin Levy is said to have been the president of Levy Auto Parts, but it is not alleged that he was a co-conspirator with Morris Levy, Al Raskin and Zakaria. There is no suggestion that Mr. Rouse of Teledyne Continental was, or might have been, a conspirator. The indictment does not disclose the reason for Benjamin Levy's request for price information on conversion kits or what he did with the information when he received it. Generally, the indictment charges that the purpose of the conspiracy was the illegal exportation of tank parts to Iran, but there is no allegation that any of the alleged conspirators attempted to sell conversion kits to Iran. The communications charged as the first 24 overt acts all are concerned with the exportation of complete tank engines.

II.

On March 25, 1982, Zakaria arrived at Dulles International Airport in the Eastern District of Virginia. He was detained when a routine customs inspection revealed that he was carrying documents concerned with the exportation of M60 tank engines, transmissions and spare parts for both to Iran. Among them were communications from Levy Auto Parts in Toronto. The agent in charge of the field office of the Customs Service was summoned and, according to the agent's affidavit in support of an arrest warrant, Zakaria apparently talked readily to him. He admitted that he had dealt with the Iranians, and he had reached an agreement with them for the sale of M60 tank parts upon his obtaining false end user certificates from Pakistan. He said that his son-in-law, Amin Din, of the District of Columbia, was to have been in charge of the American end of the venture.

According to the affidavit, the agent then called Mr. Din and told him of the detention of his father-in-law on suspicion of violating the export laws in connection with the sale of M60 tank parts to Iran. Din responded that the deal had not gone through because Pakistan had declined to supply the false end user certificates. Din agreed to go to the airport, where there was further conversation with the agent.

Zakaria and Din were arrested on a complaint charging them with conspiring among themselves and with others to sell munitions to Iran in violation of the general conspiracy statute. 18 U.S.C.A. § 371.

Later, pursuant to a plea agreement, Zakaria entered a plea of guilty to an information charging him and Kabanza, Inc. with counseling, aiding and abetting the use of a false end user certificate in an application for an export license for goods on the United States Munitions Control List in violation of 22 U.S.C.A. § 2778 and 22 C.F.R. § § 127.01(c) and 127.02. Zakaria appears to have been chairman of the board of Kabanza, and his son-in-law, Din, was one of its officers. So far as appears, Din was not prosecuted.

III.

Initially, the court was concerned with the applicability of § 3238 to this case, on the possibility that Zakaria was not "arrested" or was not a "joint offender" within the meaning of that statute. Neither statutory argument has merit. Although Zakaria pled guilty to a charge of counseling, aiding and abetting, he was arrested upon a complaint charging a conspiracy in violation of 18 U.S.C.A. § 371. Given the complaint and the affidavit on which it was based, Zakaria was "restrained of his liberty in connection with the offense" with which these defendants were charged, *see United States* v. *Erdos*, 474 F.2d 157, 160 (4th Cir. 1973); *United States* v. *Cantino*, 735 F.2d 718, 724 (2d Cir. 1984), and therefore was "arrested" within the meaning of § 3238.

Similarly, we do not think that Zakaria's plea to a lesser, but closely related, substantive offense changes his status as a "joint offender." The customs agent's affidavit clearly discloses that Zakaria and the present defendants were suspected of concerted criminal activity. There is nothing in § 3238 which prevents the prosecution from reaching a plea agreement with a suspected joint offender in exchange for information aiding the prosecution of other offenders. Thus, it is entirely appropriate to treat Zakaria's arrest as that of a joint offender within the meaning of § 3238.

IV.

The defendants do not contend that venue might be laid in the Eastern District of New York because the air shipment of the parcel containing manuals and other documents was through that district. They do not contend that Zakaria or Din did anything in the District of Columbia to support venue in that district. They do contend that venue could and should have been laid in the Western District of Michigan on the basis of the 25th and 26th alleged overt acts.

Article III, § 2 of the Constitution of the United States provides that "the Trial of all Crimes . . . shall be held in the State

where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed." Congress has implemented the first clause by various statutory provisions addressing situations in which a crime involves more than one district. The general provision is 18 U.S.C.A. § 3237(a), authorizing prosecution in any district in which an offense "was begun, continued, or completed." The second clause was implemented by the predecessors of what is now § 3238. As revised and enacted into positive law in 1948, it reads:

> § 3238. Offenses not committed in any district.
>
> The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district in which the offender, or any one of two or more joint offenders, is arrested or is first brought; but if such offender or offenders are not so arrested or brought into any district, an indictment or information may be filed in the district of the last known residence of the offender or of any one of two or more joint offenders, or if no such residence is known the indictment or information may be filed in the District of Columbia.

The 1948 revision inserted the words "begun or" in the first line of the section. The Revisor's Note says those words were inserted "to clarify the scope of this section and section 3237 of this title." This leads the United States to contend that § 3238 is now a continuing offense statute comparable to § 3237(a) and that venue may be founded upon it if the offense was begun abroad even though it may have involved substantial activity in one or more districts within the jurisdiction of the United States. The defendants, on the other hand, taking their cue from the section's title, insist that venue may not be founded upon § 3238 if the offenses involved any activity in the United States, however predominantly foreign the offenses may have been.

The defendants offer as an explanation of the insertion of the words "begun or" an intention to reverse the result in the old case

of *United States v. M'Gill*, 4 U.S. (4 Dall.) 426 (1806). In *M'Gill*, the defendant was prosecuted for murder. He struck the fatal blow while on shipboard on the high seas, but the victim did not die until after he had been put ashore outside the jurisdiction of the United States. The Court held that the crime of murder was not complete until the victim's death and, hence, there could be no prosecution for murder under the predecessor of § 3238. *Id.* at 429.

The suggestion that the 1948 amendment of § 3238 was designed to take care of the more than 140 year old *M'Gill* problem is without foundation. The 1948 amendment of § 3238 would not take care of the basic *M'Gill* problem. If the victim died on foreign land outside the jurisdiction of the United States, the infliction of the mortal wound on the high seas would still not be murder, and the actor would be subject to prosecution in a district court in the United States only for the assault.

The Congress knew what it was doing, however. In the same bill in which it accomplished the 1948 amendment of § 3238, it provided in 18 U.S.C.A. § 3236 that in all cases of murder or manslaughter the offense shall be deemed to have been committed in the place where the injury was inflicted, regardless of the place of death. That took care of the problem in domestic as well as in foreign settings and completely obviated any need stemming from the *M'Gill* problem to amend § 3238.

V.

While the 1948 amendment of § 3238 did not have the limited purpose suggested by the defendants, its actual purpose is not clearly apparent. Since it now applies to offenses "begun or committed" upon the high seas or outside the jurisdiction of any state or federal district, it may be viewed as a continuing offense section. The cryptic Revisor's Note that the 1948 amendment was enacted to "clarify the scope" of § 3238 and § 3237 suggests some intention to harmonize those sections and make them comparable. Retention of the title "Offenses not committed in any

district," however, suggests congressional intention not to radically alter the earlier reach of that section. Moreover, in construing the statute, the higher authority of Article III, § 2 of the Constitution must be respected and observed.

There is little judicial precedent to guide us.

In *United States* v. *Gilboe*, 684 F.2d 235, 239 (2d Cir. 1982), *cert. denied*, 459 U.S. 1201 (1983), there is a dictum that § 3238 applies only to those offenses indicated by the section's title. *Id.* at 239. *Gilboe*, however, was a vastly different case. Gilboe was prosecuted for two frauds of global proportions. He was headquartered in Hong Kong, but in connection with one of his ventures, he sought to charter ships through brokers in the Eastern District of New York, and the large sums of money generated by his ventures were banked through banks in the Southern District of New York. He was arrested in Connecticut. Though the District of Connecticut was not shown to have had any other connection with the offense, Gilboe objected to venue in the Southern District of New York. He insisted that venue could only be laid in the District of Connecticut under § 3238. The Court of Appeals for the Second Circuit very properly upheld venue in the Southern District of New York under § 3237(a), in which substantial portions of the offenses had taken place.

Contrary to the dictum in *Gilboe*, the Fifth Circuit has held that venue may properly be laid under § 3238 in the district of arrest, notwithstanding the fact that substantial activity in furtherance of the conspiracy took place in another district. *United States* v. *Erwin*, 602 F.2d 1183, 1185 (5th Cir. 1979), *cert. denied*, 444 U.S. 1071 (1980); *United States* v. *Williams*, 589 F.2d 210, 213 (4th Cir. 1979), *adopted in pertinent part*, 617 F.2d 1063, 1071 (5th Cir. 1980) (*en banc*).

Erwin and *Williams* involved drug importation conspiracies in violation of 21 U.S.C.A. § 963. In *Williams*, an overt act in furtherance of the conspiracy took place in New York and the defendant argued that venue was proper only in that district under § 3237(a). *Williams*, 589 F.2d at 213. The court rejected Williams' "erroneous premise" and held that "a suggestion that

venue is proper under § 3237(a) will not serve to divest venue from another judicial district if venue is proper in that district under § 3238." *Id.*

The defendants argue that *Williams* and *Erwin* are inapposite because there is no requirement that an overt act be proven to make out a conspiracy under 21 U.S.C.A. § 963. *See United States* v. *Pool*, 660 F.2d 547, 560 (5th Cir. 1981). The defendants contend that these cases mean only that venue for conspiracies which require no overt act may be established under § 3238 even if venue in another district under § 3237(a) would be proper. We cannot accept the suggested distinction of *Williams* and *Erwin*. It is true that an offense is made out under § 963 upon direct proof of a conspiracy without the necessity of proof of any act in furtherance of it. However, proof of overt acts may strongly support other proof of the conspiracy, and proof of overt acts in New York discloses that the conspiracy had a presence in New York and was alive and well at the time.

While it was unnecessary in *Williams* and *Erwin* that the indictment charge any overt act in furtherance of the conspiracy, it may be said with equal assurance that it was unnecessary that the prosecutor in this case allege overt acts 25 and 26. According to the indictment, the conspiratorial agreement had been entered into and numerous acts in furtherance of it performed long before Benjamin Levy's inquiry about prices of conversion kits. The offense of conspiracy had been fully committed outside the United States, and many acts in furtherance of it had been done in Canada, Pakistan, Greece and Iran. If the unseasonable inquiry about prices of conversion kits had any connection with the conspiracy to sell complete engines and transmissions, apparently it was a tenuous one. The allegations of overt acts 25 and 26 had a quality of surplusage, just as the allegation of New York activity in *Williams*.

In *Williams*, the Fifth Circuit explicitly recognized that venue probably might have been laid in New York under § 3237(a). Its explicit holding was that there is an overlap between the two

sections, and that venue under § 3238 is appropriate notwithstanding the fact that venue in another district also could have been appropriate under § 3237(a).

VI.

This is not a case calling for a broad holding. It is not a case of a conspiracy formed abroad but producing substantial activity in furtherance of its purpose in the United States. Had the conspiracy succeeded and the conspirators applied for and obtained an export license based upon false Pakistani certificates so that crucial activity would have occurred in the District of Columbia, we would perhaps have had a different case.

Here, the aborted conspiracy was essentially foreign. Substantial activity in the District of Columbia was contemplated, but venue could not have been laid in the District of Columbia on the basis of contemplated activity which was frustrated before it began. If, as we have seen, the inquiry in the Western District of Michigan about prices of conversion kits had any connection with the charged conspiracy, it was insubstantial and quite insufficient in itself to divest the conspiracy of the essential foreign flavor it possessed. Under these circumstances, we hold that speculation that venue might have been laid in the Western District of Michigan is an insufficient basis for a conclusion that venue under § 3238 in the Eastern District of Virginia was improper.

VII.

Article III, § 2 of the Constitution requires that local crimes be prosecuted locally in order to alleviate a defendant's hardship at being sent to "a strange locality to defend himself against the powerful prosecutorial resources of the Government." *Dupoint* v. *United States,* 388 F.2d 39, 44 (5th Cir. 1967). When a conspiracy is formed in one district and overt acts are done in furtherance of it in other districts, however, venue may be laid for the prosecution of all the conspirators in any one of those districts. *See* 2 Wright, *Federal Practice & Procedure* § 303. That is not a violation of the Constitution's command of local prosecution for

local crimes, though some of the co-conspirators, themselves, may have had no direct connection with the district in which venue is laid. *See Hyde* v. *Shine*, 199 U.S. 62, 76-77 (1905). Nor is it a violation of that command when, as here, venue is laid under § 3238 in the district of arrest of one of the co-conspirators when conspiratorial activity in other districts is no more than slight.

Moreover, there seems to be no unfairness in the prosecution of these defendants in the Eastern District of Virginia. None resides in the Western District of Michigan. None appears to have a substantial connection with that district. Except that the Eastern District of Virginia is somewhat more distant from Toronto than the Western District of Michigan, there is nothing to suggest that trial in the Eastern District of Virginia would be more burdensome to these defendants than trial in the Western District of Michigan. Offsetting the fact that northern Virginia is not as close as Toronto as is Muskegon, there is the fact that this investigation naturally and properly developed in the Eastern District of Virginia with a substantial investment of time and energy on the part of prosecutors and grand jurors. *Cf.* S. Rep. No. 146, 80th Cong., lst Sess. (1963), *reprinted in* 1963 U.S. Code, Cong. & Ad. News at 660-61 (noting that § 3238 was intended to eliminate the expense of separate grand juries, indictments and trials of joint offenders).

Assuredly prosecution in the Eastern District of Virginia at Alexandria would place upon these defendants no greater burden than that frequently experienced by co-conspirators required to defend themselves in districts far from homes and normal activities when venue is laid under § 3237(a). We perceive no essential unfairness in permitting the prosecution in the Eastern District of Virginia to proceed.

VIII.

We conclude that the alleged activity in the Western District of Michigan that, at best, was slight and tangential, did not make § 3238 inapplicable. Venue in the Eastern District of Virginia under § 3238 was proper, and the order of the district court dismissing the indictment is reversed.

REVERSED.

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES OF AMERICA - v - LEVY AUTO PARTS OF CANADA, MORRIS P. LEVY, and AL RASKIN, *Defendants.*	Criminal No. 82-286-A

ORDER

It appears that in this matter, which involves a charge of conspiracy pursuant to 18 U.S.C. § 371, the indictment alleges overt acts occurring in the Western District of Michigan. Such an overt act is a necessary element of a conspiracy brought pursuant to 18 U.S.C. § 371. The sole asserted basis for venue in this action is 18 U.S.C. § 3238. The court being of the opinion that 18 U.S.C. § 3238 is inapplicable because the offense alleged in the indictment was committed in the Western District of Michigan and therefore could be tried there, it is hereby

ORDERED that the motion of the defendant Levy Auto Parts of Canada to dismiss the indictment because of improper venue is granted.*

/s/ ALBERT V. BRYAN, JR.
United States District Judge

Alexandria, Virginia
December 7th, 1984

*The two individual co-defendants have never been arraigned nor subjected themselves to the jurisdiction of the court.

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES OF AMERICA

- v -

MORRIS P. LEVY and
AL RASKIN,

Defendants.

Criminal No. 82-286-A

ORDER

For the same reasons set forth in the court's order of December 7, 1984, the court concludes that venue in this action is improper as to the individual defendants Morris P. Levy and Al Raskin, and accordingly, on their motion, it is hereby

ORDERED that the indictment is dismissed as to them, and finally, for improper venue.

/s/ ALBERT V. BRYAN, JR.
United States District Judge

Alexandria, Virginia
December 28th, 1984

Supreme Court, U.S.
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No. 85-2131

In the Supreme Court of the United States

OCTOBER TERM, 1986

LEVY AUTO PARTS OF CANADA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
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In the Supreme Court of the United States

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LEVY AUTO PARTS OF CANADA, ET AL., PETITIONERS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the court of appeals erred in reversing orders dismissing an indictment because of improper venue.

Subsequent to the arrest of one Saeed Zakaria, a co-conspirator, petitioners were charged in an indictment returned in the United States District Court for the Eastern District of Virginia on December 6, 1982, with conspiracy to violate the Arms Export Control Act, 22 U.S.C. 2751-2794, in violation of 18 U.S.C. 371. The object of the charged conspiracy was to procure the exportation of tank engines to Iran under export licenses falsely showing Pakistan as the ultimate destination of the engines. The indictment alleged 26 overt acts in furtherance of the conspiracy. Twenty-four of the overt acts were alleged to have been committed in other countries, but two of the overt acts referring to the transmission of price information were alleged to have been committed in the Western District of Michigan. Before trial, petitioners moved to dismiss the indictment on the ground that venue was proper only in Michigan, not in Virginia. The govern-

ment, in response, argued that venue was proper in the Eastern District of Virginia because one of the conspirators, Zakaria, had been arrested there. The government pointed out that under 18 U.S.C. 3238, venue for an offense committed outside the United States is proper in any district in which one of the offenders is arrested.

On December 7 and 28, 1984, the district court entered orders dismissing the indictment (Pet. App. A13-A14). It ruled that the allegations of overt acts in the indictment that occurred in the Western District of Michigan preempted venue in Virginia under 18 U.S.C. 3238. On April 10, 1986, the court of appeals reversed (Pet. App. A1-A12). It held that venue in the Eastern District of Virginia was proper under 18 U.S.C. 3238 because the alleged activity in Michigan was minimal, at most, and tangential to the main features of the offense.

Petitioners contend (Pet. 5-11) that both 18 U.S.C. 3238 and the Constitution preclude venue in a district solely on the basis that an offender was arrested there, when venue may be laid in another district in which the offense is alleged to have been committed. Whatever the merits of petitioners' contentions, they are not presently ripe for review by this Court.[1] The court of appeals' decision places petitioners in precisely the same position they would have occupied if the district court had denied their motion to dismiss. If petitioners are acquitted following a trial on the merits, their contentions will be moot. If, on the other hand, petitioners are convicted and their convictions are affirmed on appeal, they will then be able to present their contentions to this Court, together with any other claims they may have, in a petition for a writ of certiorari seeking

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[1] It is now more than 42 months since the return of the indictment and more than 18 months since the district court's dismissal orders. Further interlocutory review at this time would cause additional delay in the final resolution of the charges against petitioners.

review of a final judgment against them. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

JULY 1986

[2] Because this case is interlocutory, we are not responding on the merits to the question presented by the petition. We will file a response on the merits if the Court requests.

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v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY IN SUPPORT OF PETITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY IN SUPPORT OF PETITION

The government's response wholly avoids the merits of petitioners' contentions that trial in the Eastern District of Virginia would violate their fundamental constitutional right to a trial in the State and district where the offense allegedly was committed.[1] Instead, the government suggests that the Court should deny review on the ground that an acquittal in Virginia would moot petitioners' venue contentions, while a conviction would enable petitioners to present their claims to this Court at a later date.

Neither assumption is correct. An acquittal will not remedy the violations of the Constitution at issue since Art. III, § 2 and the Sixth Amendment prohibit trial in a place other than where the offense was committed. Neither an acquittal nor post-conviction reversal can alleviate or remedy the burden of being tried

1. The government's failure to respond to petitioners' statement of reasons for granting the writ is unfair. If the response does not, as it should not, persuade the Court to dispose of this petition, the government effectively solicits the Court's invitation to express its views a second time.

in an unconstitutional venue.[2] The Court previously has agreed to review venue issues before trial where the issue was presented in the same procedural posture as in this case. In *Johnston* v. *United States*, 351 U.S. 215 (1956), for example, the Court granted certiorari to review a judgment of the United States Court of Appeals for the Third Circuit reversing a judgment of the United States District Court for the Eastern District of Pennsylvania that had dismissed an indictment for lack of venue. Venue questions "touch closely the fair administration of criminal justice and public confidence in it" and "raise deep issues of public policy." *United States* v. *Johnson*, 323 U.S. 273, 276 (1944). It is no answer to the charge that petitioners are being forced to stand trial in an unconstitutional forum to suggest that consideration of the issues raised by the petition be delayed because that trial may result in an acquittal.

Conviction of the petitioners also provides no assurance that the issues now before the Court will be preserved. In this situation the government is likely to argue that any violation of the venue provisions of the Constitution was "harmless," *see, e.g., Milton* v. *Wainwright*, 407 U.S. 371 (1972); *Harrington* v. *California*, 395 U.S. 250 (1969); *Chapman* v. *California*, 386 U.S. 18 (1967), or cured by a trial free from error, *see, e.g., United States* v. *Mechanik*, 106 S. Ct. 938 (1986). If that argument were accepted, neither petitioners nor anyone else could ever enforce the requirements of Art. III, § 2 or the venue provisions of the Sixth Amendment and violation of this important constitutional requirement would be irremediable.

Moreover, under the government's proposal, petitioners, if convicted, would once again have to present the same issue to the

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2. *Cf. Abney* v. *United States*, 431 U.S. 651, 662 (1977) ("[E]ven if the accused is acquitted, or, if convicted, has his conviction ultimately reversed on double jeopardy grounds, he has still been forced to endure a trial that the Double Jeopardy Clause was designed to prohibit."); *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982) (official immunity); *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982) (Presidential immunity); *Helstoski* v. *Meanor*, 442 U.S. 500 (1979) (Speech or Debate Clause immunity).

Fourth Circuit, which has already held against them. This process would be inefficient and would inject further delay in petitioners' right to be free from an indictment alleging venue in a district where the offense cannot constitutionally be tried.[3] Such a convoluted process impairs the fair and efficient administration of justice.

3. Thus, the government's concern that "further interlocutory review at this time would cause additional delay in the final resolution of the charges against petitioners" cannot be taken at face value. Indeed, the government made no effort to bring petitioners to trial after the indictment was returned and likely would have continued to make no effort to this day had petitioners not appeared voluntarily, two years later, to move for dismissal.

Accordingly, for the reasons stated herein and in the petition, petitioners submit that a writ of certiorari should be granted.

Respectfully,

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